Chong Chieng Jen v Mohd Irwan Hafiz bin Md Radzi & Anor

HIGH COURT (KUCHING) — CRIMINAL APPLICATION NO 44–01 OF 2009–1
RHODZARIAH BUJANG JC
20 MARCH 2009

Criminal Procedure — Search warrant — Items which could have been legitimately seized — Suspicion of keeping — Attorney General instructed seizure of computer and laptop belonging to applicant — Search warrant — Seized item brought to magistrate court — Magistrate not available — Laptop handed to first respondent on instruction of magistrate via telephone conversation — Whether seizure contrary to law — Criminal Procedure Code s 56

Criminal Procedure — Search warrant — Scope of search warrant — Incriminating evidence — Seditious article — Not viewed by magistrate — Whether magistrate could form opinion of its seditious tendencies without viewing article — Whether warrant infringed s 56 of the Criminal Procedure Code

The applicant, a lawyer practicing in the legal firm of Messrs Chong Brothers Advocates Kuching, was an elected Member of Parliament for Bandar Kuching. His victory for the seat was subsequently challenged by one Kho Whai Phiaw in an election petition which was dismissed by the trial judge and subsequently on appeal to the Federal Court. While the matter was pending appeal in the Federal Court, the first respondent applied to the magistrate's court and obtained two search warrants to search the premises of Messrs Chong Brothers Advocates and the residential home of the applicant on grounds of suspicion of keeping incriminating materials. The learned magistrate was also informed that the police was instructed by the attorney general to seize all computers and laptop belonging to the applicant. Pursuant to the search warrants the applicant's laptop was seized and brought to the magistrate's court for it to be dealt with in accordance with the law as required by s 56 of the Criminal Procedure Code ('CPC'). Unfortunately, no magistrates were available on that day as all were away due to an official function. The matter was brought to the attention of one of the registrars of the subordinate courts, who, after receiving instruction from the learned magistrate via a telephone conversation, handed over the laptop to the first respondent. The applicant sought to set aside the two search warrants on the ground that they were issued contrary to law due to the non-compliance with s 56 of the CPC.

Held, setting aside search warrants and ordering the seized laptop be returned to applicant:

(1) What must be laid before the learned magistrate must not be just any information but one credible enough to form a basis for believing that seditious materials were to be found in the two places named in the warrant and in the context of this case, nothing was more urgent than the article, which was the subject of query by the election judge, itself. Without the article, the learned magistrate would not be in the position to assess for himself whether the said article contained seditious tendencies which pointed to a criminal offence (see para 13).

(2) Pursuant to s 56 of the CPC the requirement for 'information' and 'reason to believe' is mandatory as the execution of the warrant would result in the invasion of the privacy and property of the owner of the premises and might even result in the confiscation of his property (see para 8).

(3) On the facts, no police report of the complainant was exhibited to the application and neither was the impugned article or the instruction from the attorney general's office, if it was written, or if oral, and the relevant entry in the investigation diary of the police officer concerned to show when this instruction was received. If there was due diligence on the part of the magistrate or if he had been aware of the election judge's decision on it, there was some degree of probability that he might not have issued the search warrant without asking for further information or making further inquiry from the first respondent respecting the article (see paras 12 & 15).

(4) With regards to the search warrants, it was obvious that the mere belief of the complainant could not constitute 'information' nor 'reason to believe' under s 56 of the CPC. They were unlawfully issued and must be set aside. Further, the acts of the registrar of the subordinate courts was not 'in accordance with the law' and had clearly infringed s 56 which warranted the setting aside of the search warrants (see paras 17 & 20).

Observation:

No doubt the first respondent had complied with the provision of s 56 when he brought the laptop back to the court and handed it over to the registrar of the subordinate courts but what the registrar of the subordinate courts did was not dealing with it 'in accordance with the law'. She was merely obeying the instruction of the magistrate who had no physical sight of the laptop seized in order to make up his mind what next to do with it. Though it was most unfortunate that no magistrate was around on that day the most logical thing to do would be to keep the laptop in the custody of the registrar of the

subordinate courts pending the next working day where not just the learned magistrate but other magistrates would be around to deal with the seized laptop (see para 20).

[Bahasa Malaysia summary

Pemohon, seorang peguamcara yang beramal di firma guaman Tetuan Chong Brothers Peguambela Kuching, merupakan seorang Ahli Parlimen Bandar Kuching. Kemenangannya bagi kerusi Bandar Kuching kemudiannya dicabar oleh Kho Whai Phiaw dalam suatu petisyen pilihanraya, yang mana ditolak oleh hakim bicara dan seterusnya atas rayuan ke Mahkamah Persekutuan. Sementara kes ini menunggu rayuan di Mahkamah Persekutuan, responden pertama telah memohon dan mendapat, daripada mahkamah majistret, dua waran geledah untuk menggeledah pejabat Tetuan Chong Brothers Peguambela dan juga kediaman pemohon atas alasan disyaki menyimpan barangan yang boleh menunjukkannya bersalah. Majistret yang bijaksana juga diberitahu bahawa pihak polis diarahkan oleh peguam negara untuk menyita/merampas semua komputer dan komputer riba milik pemohon. Berikutan dengan waran geledah tersebut, komputer riba pemohon dirampas dan dibawa ke mahkamah majistret untuk ditangani menurut undang-undang seperti yang dikehendaki oleh s 56 Kanun Prosedur Jenayah ('KPJ'). Malangnya, tiada majistret pada hari itu kerana kesemua mereka menghadiri suatu majlis rasmi. Perkara tersebut dibawa kepada perhatian pendaftar mahkamah rendah, dan selepas mendapat arahan daripada majistret melalui perbualan telefon, beliau menyerahkan komputer riba tersebut kepada responden pertama. Pemohon memohon untuk mengetepikan kedua-dua waran geledah tersebut atas alasan waran-waran itu dikeluarkan bertentangan dengan undang-undang atas sebab ketidakpatuhan kepada s 56 KPJ.

Diputuskan, mengetepikan waran geledah dan memerintahkan komputer riba yang dirampas dikembalikan kepada pemohon:

(1) Apa yang mesti dikemukakan kepada majistret yang bijaksana bukan semata-mata sebarang maklumat tetapi sesuatu yang boleh dipercayai secukupnya untuk membentuk asas untuk mempercayai bahawa material yang berunsur hasutan akan dijumpai di dua tempat yang dinamakan di dalam waran dan di dalam konteks kes ini, tiada apa-apa yang lebih penting daripada artikel, yang merupakan perkara persoalan oleh hakim pilihanraya itu sendiri. Tanpa artikel tersebut, majistret yang bijaksana bukan dalam kedudukan untuk menilai sendiri sama ada artikel tersebut mengandungi kecenderungan berunsur hasutan yang merujuk kepada kesalahan jenayah (lihat perenggan 13).

(2) Menurut s 56 KPJ keperluan untuk 'information' dan 'reason to believe' adalah mandatori kerana pelaksanaan waran akan mengakibatkan kepada pelanggaran privasi dan harta pemilik premis tersebut dan malah boleh mengakibatkan kepada perampasan hartanya (lihat perenggan 8).

(3) Di atas fakta, tidak ada laporan polis pengadu yang diekshibitkan dengan permohonan dan juga tidak ada artikel yang dipersoalkan atau arahan daripada pejabat peguam negara, sama ada bertulis, atau lisan, maka kemasukan yang relevan di dalam diari penyiasatan pegawai polis yang berkenaan untuk menunjukkan bahawa arahan tersebut diterima. Jika terdapat ketekunan yang sewajarnya pada pihak majistret atau jika beliau mempunyai pengetahuan tentang keputusan hakim pilihanraya ke atasnya, terdapat sedikit kemungkinan bahawa beliau tidak mungkin akan mengeluarkan waran geledah tanpa meminta maklumat lanjut atau membuat penyiasatan lanjut daripada responden pertama berkaitan dengan artikel tersebut (lihat perenggan 12 & 15).

(4) Berkaitan dengan waran geledah tersebut, jelas bahawa kepercayaan semata-mata oleh pengadu tidak boleh membentuk 'information' mahupun 'reason to believe' di bawah s 56 KPJ. Ia dikeluarkan menyalahi undang-undang dan seharusnya diketepikan. Selanjutnya, tindakan pendaftar mahkamah rendah tidak 'in accordance with the law' dan jelas melanggar s 56 yang mewajarkan pengetepian waran geledah (lihat perenggan 17 & 20).

Pemerhatian:

Tidak diragui bahawa responden pertama telah mematuhi peruntukan s 56 apabila dia membawa komputer riba kembali ke mahkamah dan memberikannya kepada pendaftar mahkamah rendah tetapi apa yang dilakukan oleh pendaftar mahkamah rendah tidak menanganinya 'in accordance with the law'. Beliau semata-mata mematuhi arahan majistret yang tidak melihat secara langsung komputer riba yang dirampas untuk menentukan langkah seterusnya yang harus diambil. Walaupun adalah dikesali bahawa tidak ada majistret pada hari itu, perkara yang paling rasional untuk dibuat adalah menyimpan komputer riba dalam milikan pendaftar mahkamah rendah sehingga hari bekerja yang seterusnya di mana bukan sahaja majistret tersebut tetapi majistret-majistret lain akan ada untuk menguruskan komputer riba yang dirampas tersebut (lihat perenggan 20).]

Notes

For a case on items which could have been legitimately seized, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3247.

For a case on scope of search warrants, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3253.

Cases referred to

Ahmad bin Ishak v PP [1974] 2 MLJ 21, HC (refd)

DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22; [2000] 6 CLJ 435, HC (distd)

Legislation referred to

Criminal Procedure Code s 56
Evidence Act 1950
Federal Constitution art 13(1)
Sedition Act 1949 s 4(c)

Alvin Yong (Chong Siew Chiang, Voon Lee Shan, Tan Kee Heng, Wong King Wei and Yung Ing Ing with him) (Chong Brothers Advocates) for the applicant.

Fadzillah Begum (Senior Federal Counsel, Attorney General's Chambers, Sarawak) for the respondent.

Rhodzariah Bujang JC:

[1] The applicant, a lawyer practising in the legal firm of Messrs Chong Brothers Advocates Kuching is an elected Member of Parliament for Bandar Kuching. His victory for the seat was subsequently challenged by one Kho Whai Phiaw in an election petition and one of the grounds of that petition was an allegation that the applicant had published in his blog *chiengjen.blogspot.com*, an article seditious in nature, aimed to cause racial disharmony among voters and canvassed votes for him. This complaint was made by one Jublin ak Derai who was called as a witness at the trial of the election petition. The election judge dismissed the petition and dealt with the publication of that article in his judgment. His Lordship found, inter alia, no nexus between the applicant and the writer of that article or that the article had garnered votes for the applicant. Kho Whai Phiaw appealed to the Federal Court against the decision of the election judge but the Federal Court on *3 March 2009* dismissed the appeal.

APPLICATION FOR SEARCH WARRANTS

[2] Prior to the decision of the Federal Court but after the election judge had given his verdict, the first respondent, Inspector Mohd Irwan Hafiz made an application before the learned magistrate for search warrants under s 56 of the Criminal Procedure Code to search the premises of Messrs Chong Brothers Advocates and the residential home of the applicant on grounds of suspicion of keeping incriminating materials under s 4(c) of the Sedition Act 1949. The basis of that suspicion was the complaint by the selfsame Mr Jublin ak Derai and the selfsame article which was the subject of query by the election judge. An additional ground was also stated to the learned

magistrate and that was the police was instructed by the attorney-general to seize all computers and laptop belonging to the applicant.

[3] The learned magistrate acceded to the request and so it was that two search warrants were issued as a result of which the applicant's laptop was seized.

[4] After its seizure, the first respondent brought the laptop to the magistrate's court for it to be dealt with in accordance with the law as required by s 56 of the Criminal Procedure Code. Unfortunately, no magistrates were available on that day as all had gone to Kota Kinabalu for an official function. The matter was brought to the attention of one of the registrars of the subordinate courts, who, after receiving instruction via the telephone from a magistrate, handed over the laptop to the first respondent.

THE APPLICANT'S NOTICE OF MOTION

[5] By this motion, the applicant sought to set aside the two search warrants made by learned magistrate on the ground that they were issued contrary to law due to non-compliance with s 56 of the Criminal Procedure Code.

SECTION 56

[6] The opening sentence of this section provides that '*if a magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that anything upon, by or in respect of which an offence has been committed, or any evidence or thing which is necessary to the conduct of an investigation into any offence, may be found in any place, he may issue a search warrant*'.

[7] The primary requirement therefore is the information laid before the magistrate and the inquiry he made respecting it '*as he thinks necessary*' before issuing the warrant. The applicant's counsel submitted that there was no information before the learned magistrate and from the notes of proceedings, no inquiry was held by him. Learned senior federal counsel replied that there was sufficient information before the magistrate and the absence of an inquiry does not render the search warrants illegal because the law does not provide for the procedure on how it should be done. With respect I agree with only half of that statement. In my view the inquiry in itself is not mandatory under s 56 because it is to be conducted only if the learned magistrate '*think it necessary*'. Clearly there is a discretion vested in him whether to conduct the inquiry but it is not because as she said the law does not provide for the procedure. Although there is no prescribed procedure for such an inquiry,

nevertheless, just like any other inquiry required by law to be done, a magistrate could proceed to call for further evidence and summon any witness whom he believes would be of some assistance to him in deciding whether to issue the warrant or not.

[8] However, in my view, there is no compromise that there must be credible information before a magistrate issues the warrant or in the absence of such information, then '*reason to believe*' that incriminating evidence connected to an offence is to be found in the place stipulated in the warrant. As to what constitutes '*reason to believe*' I agree that the only way to determine it is to look into the circumstances of the case to see if they are such that any reasonable man could see sufficient cause to believe (per Arulnandom J in *Ahmad bin Ishak v Public Prosecutor* [1974] 2 MLJ 21). The requirement for '*information*' and '*reason to believe*' is mandatory because the execution of the warrant will definitely result in the invasion of the privacy and property of the owner of the premises so named and may even result in the confiscation of his property. A person's privacy and the right to his property are very basic rights of a man and that to his property is even enshrined under art 13(1) of the Federal Constitution.

[9] What I want to emphasise is this. The role of a magistrate when faced with an application for search warrants is an onerous one. He has to delicately balance the rights of a person to his privacy and the exclusive enjoyment of his property with the need of the police to gather evidence for the prosecution of offences by the state against an individual. In order for that decision to be made justly and given that the person whose rights would be infringed will not be represented at the application for the search warrant, the magistrate concerned must ensure that the information laid before him is one which possessed credibility and '*reason to believe*' means good and cogent reasons which supports the belief that incriminating evidence of an offence would be found in the premises stated in the warrant.

[10] The next question to be asked is whether there was such an information before the magistrate or reason to believe that seditious materials were to be found at the office of the legal firm or the home of the applicant.

INFORMATION/REASON TO BELIEVE

[11] From the notes of proceedings of the learned magistrate, it would appear that, at the hearing of the application for the warrants, he was merely informed

(i) of a complaint by En Jublin ak Derai that there was an article posted

in the blog of the applicant whom the complainant believed was seditious in nature and was used by the applicant to canvass for votes in the last general election.

(ii) the office of the attorney general had directed that all computers and laptop of the applicant be seized.

[12] No police report of the complainant was exhibited to the application and neither was the impugned article or the instruction from the attorney general's office, if it was written, or if oral, then the relevant entry in the investigation diary of the police officer concerned to show when this instruction was received.

[13] It must be stressed again that what must be laid before the learned magistrate must not be just any information but one credible enough to form a basis for believing that seditious materials were to be found in the two places named in the warrant and in the context of this case, nothing is more urgent than the article itself. Without the article, the learned magistrate would not be in the position to assess for himself whether the said article contained seditious tendencies which points to a criminal offence. Instead what he was told was merely the *belief* of En Jublin ak Derai that the article has criminal elements and which caused disharmony amongst those of different races and religions (the Bahasa Malaysia words used were '*... artikel tersebut juga berunsur jenayah dan memberikan ketidakselesaan antara kaum dan negara*').

[14] In my view, this snippet of opinion, was clearly not enough to constitute '*information*' or '*reason to believe*' under s 56 of the Criminal Procedure Code bearing in mind what I said earlier that a search warrant is a tool which legalise the invasion of a person's privacy, his property and may even lead to the confiscation of his property.

[15] Further, as rightly submitted by the applicant's counsel, the learned magistrate ought to have known, given the wide publicity of the decision of the election judge that the matter complained of by En Jublin ak Derai as mentioned in the search warrant was raised in the election petition. In saying so, I am not imposing too high a burden on the learned magistrate or any other magistrate for that matter to know each and every case decided by the courts, in particular the higher courts, but only the cases which has received prominent coverage in the media. Further, the election case was heard in Kuching, the same station the learned magistrate is serving. If there was due diligence on his part or if he had been aware of the election judge's decision on it, there is some degree of probability that he might not have issued the search warrant *without* asking for further information or making further inquiry from the first respondent respecting the article.

[16] In saying this I am aware of the decision in *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22; [2000] 6 CLJ 435 where it was held that there was no presumption that a prior judgment is the correct decision on a matter and that there is nothing in the Evidence Act 1950 to warrant the conclusion that the statements or finding of facts in another case can be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case. However, here the situation is different. What the learned magistrate should be concerned with is the credibility of the information before him and the fact that a court, a superior one at that had made findings of fact which showed that no offence of the magnitude of the complainant's belief was committed should be relevant to help him in his decision. In this regard one of the applicant's counsel have submitted that the burden of proof in election cases being beyond reasonable doubt and since the matter of the article has been decided by the election judge and was, therefore, res judicata, there was nothing left for the police to investigate as it has been found by the election judge that no offence had been committed by the applicant. With due respect, I am unable to agree with this point of submission as it is totally the prerogative of the attorney-general whether to go ahead with the prosecution of an offence under any law against the applicant despite the findings of the election judge, bearing in mind what was said in *DP Vijandran*'s case as quoted earlier.

[17] Coming back to the search warrants in this case, it was obvious to me upon examination of the notes of proceedings that the *mere belief* of the complainant cannot constitute '*information*' nor '*reason to believe*' under s 56 of the Criminal Procedure Code. They were in my view unlawfully issued and must be set aside.

IN ACCORDANCE WITH THE LAW

[18] Before I conclude, I need to just mention one other issue brought up at the hearing before me. It is that the registrar of the subordinate courts should not have handed over the laptop to the first respondent.

[19] Section 56 of the CPC provides that after seizure, the item seized must be brought before the same magistrate or some other magistrate to be dealt with in accordance with the law.

[20] No doubt the first respondent had complied with the provision of s 56 when he brought the laptop back to the court and handed it over to the registrar of the subordinate courts but what the registrar of the subordinate courts did was not, as rightly submitted by the applicant's counsel, dealing with it '*in accordance with the law*'. She was merely obeying the instruction of the magistrate who had no physical sight of the laptop seized in order to

make up his mind what next to do with it. Though it was most unfortunate that no magistrate was around on that day, in my view, the most logical thing to do would be to keep the laptop in the custody of the registrar of the subordinate courts pending the next working day where not just the learned magistrate but other magistrates would be around to deal with the seized laptop. Clearly the provision of s 56 has been infringed yet again. This infringement reinforced my earlier decision that the search warrants issued in this case must be set aside. The laptop of the applicant accordingly must be returned to him. At the first hearing of this motion before me I was informed by the first respondent personally that the laptop has been surrendered to the forensic department of the Police Headquarters in Kuala Lumpur. I therefore could not order that it be returned forthwith but within three working days from day of delivery of this decision to enable the necessary arrangements to be made respecting it's handing over.

Search warrants set aside and seized laptop ordered to be returned to applicant.

Reported by Ashgar Ali Ali Mohamed